IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

MONDAY, THE 9TH JULY 2007 / 18TH ASHADHA 1929

WP(C).No. 33721 of 2004(M)

OS.198/2001 of ADDL.SUB COURT,KOTTAYAM

PETITIONER:

THOMAS OOMMEN, S/O.M.C.OOMMEN,
MANNARKUNNEL HOUSE, THIRUMOOLAPURAM P.O.
THIRUVALLA TALUK.

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.K.JAYAKUMAR

RESPONDENTS:
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1. MOLLY JACOB, ROSARY, PALLOM
KOTTAYAM DISTRICT.

2. FR.KOSHY MATHAI, HILL VIEW BUNGLOW,
PALLAM P.O. KOTTAYAM DISTRICT.

BY ADV. SRI.P.G.PARAMESWARA PANICKER
SRI.P.GOPAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 9.7.2007, THE COURT ONTHE SAME DAY, DELIVERED THE FOLLOWING:

WP(C) 33721/2004

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE LIST OF ADDITIONAL WITNESSES FILED ALONG WITH I.A. NO. 2422/2004 IN O.S. NO. 198/2001 FILED BY THE PETITIONER, DATED 20.8.2004.

EXT.P2 TRUE COPY OF THE ORDER OF THE PRINCIPAL SUB JUDGE, KOTTAYAM, DATED 5.11.2004 REJECTING I.A. NO. 2422/2004 FILED BY THE PETITIONER IN O.S. NO. 198/2001.

RESPONDENTS' EXHIBITS:

EXT.R1(a) TRUE COPY OF THE JUDGMENT DATED 28.7.2004 IN W.P.(C) NO. 8072/2004 ON THE FILE OF THIS HON'BLE cOURT.

EXT.R2(b) TRUE COPY OF THE INTERLOCUTORY APPLICATION NO. 2422 OF 2004 DATED 26.8.2004.

// TRUE COPY //

P.S. TO JUDGE.

knc/-

P.R. RAMAN J.

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W.P.(C) NO. 33721 OF 2004

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DATED THIS, THE 9TH DAY OF JULY, 2007.

J U D G M E N T

Petitioner herein is the plaintiff in O.S.198/2001 on the file of the Sub Court, Kottayam. The suit is for recovery of money. According to the petitioner, he entered into an agreement on 3.8.1994 with the first respondent for sale of his properties. It is alleged that a total sale consideration of Rs. 20 lakhs was fixed and the period for payment was fixed as five years from the date of agreement. The suit is filed for recovery of the amount alleged to have been paid as advance.

2. A detailed written statement was filed by the defendants denying the entire transaction. It was contended that a reading of the agreement will show that it was executed at Thiruvalla in Kerala and according to the first defendant on the date of the alleged agreement she and the two attestors were actually residing in U.S.A. The suit was posted for trial and the plaintiff examined two witnesses in support of his case and some documents were also marked. The first defendant was examined as DW.1. Before closing the evidence of the plaintiff, since the first defendant was residing

abroad and as she want to return back, on a special request made and as agreed to by the plaintiff, the first defendant was examined before completion of the evidence of the plaintiff. Thereafter, petitioner sought to amend the plaint and an application seeking amendment was filed which was dismissed by the court below against which W.P.(C) 8072/2004 was filed before this Court. This Court took the view that the correctness or otherwise of the view taken by the trial court can be considered only by the appellate court while considering the appeal and taking into consideration the fact that the disputed question of facts cannot be gone into in a proceedings under Articles 226 & 227of the Constitution, that writ petition was dismissed reserving the right of the petitioner herein to challenge the order impugned therein in the appeal eventually to be filed against the decree in case the suit is decided against him. In the said judgment, it was directed by this Court that if the Subordinate Judge who recorded evidence in the said suit is transferred to another court in the same station, the suit will also stand transferred to that court and the Judge who recorded the evidence shall hear and dispose of the suit and if the evidence is not completed, the case need not be transferred.

3. This judgment was rendered by this Court on 28th of July, 2004. It was thereafter that an application as I.A. 2422/2004 was filed under

Section 114 and 151 read with Order 47 Rule 1 of the Code of Civil Procedure, seeking reopening of the suit for further evidence of the plaintiff by reviewing the order posting the suit for hearing and to issue summons to the witnesses mentioned in the schedule of witnesses. As per the finding of the court below in para 7 of its order, this application was filed on 13.9.2004. The court below rejected the said application as per Ext.P2 order against which this writ petition is filed seeking to quash the said order and to grant appropriate relief enabling the petitioner to reopen the evidence as sought for.

4. The contention in support of the application was mainly that the petitioner has to examine the person who typed the agreement involved in the case and also the associate advocate, as the advocate who drafted the same is no more and two independent witnesses having direct acquaintance with the entire transaction.

5. In the counter affidavit filed by the respondent, inter alia there was a contention that the petition is not maintainable. It was further contended that it was filed only to circumvent the order which this court passed in W.P.(C) 8072/2004, that the suit itself was filed on the basis of a forged agreement and the attesting witnesses have already been examined, that it was after the evidence of the petitioner the case was posted for

hearing, that the trial was prolonged only at the instance of the petitioner who challenged the orders passed by by the trial court rejecting the petition for sending the agreement for expert opinion as well as the application for amendment of the plaint. In the absence of any valid reason explaining as to why the plaintiff omitted to examine his witnesses earlier, no miscarriage as such has crept in warranting interference under Article 226 or 227 of the Constitution is made. The present application is made without any bona fide and with a view to protract the case.

6. It was submitted by the learned counsel for the respondents that the first defendant after examination, has returned to the United States and in case the petitioner is allowed to further examine her, she may have to be recalled incurring huge expenditure and therefore, serious prejudice will be caused in case this application is allowed.

7. The trial court found that W.P.(C) 8072/2004 was dismissed by judgment dated 28.7.2004. But the present application for reopening the case seeking to examine additional witnesses was filed only belatedly, for which no satisfactory explanation is forthcoming. Besides, it was also found that several adjournments were taken by the applicant and the applicant had thus sufficient opportunity to approach the court seeking for reopening the case even earlier which he failed to do so. It was also

observed that the additional evidence which is sought to be let in is concerning the matter which is not specifically pleaded and even if evidence is allowed to be adduced, that cannot be looked into or relied upon.

8. Learned counsel for the petitioner challenges the above order mainly contending that the present application for re-opening the case necessitated as a result of the rejection of the application for amendment of the plaint sought for. Learned counsel would submit that he was under the impression that the amendment application would be allowed and only when it was rejected that he could file the present application, as a ground explaining the delay occurred in filing the present application. It is his further contention that the court below did not actually consider the fact that the after the dismissal of W.P.(C) 8072/2004 on 28th July, 2004, within one month thereafter, the present application had been filed and therefore, it cannot be said that the application filed is berupt of bona fide or there is inordinate delay in approaching the court for seeking the reliefs. It is further contended that if the object of the present application is to get consideration of the matter by the same court , then by this time the trial judge himself may have been transferred and the petitioner could not have seriously pressed his reliefs. On the other hand, any delay in final disposal

of the suit will only delay the enjoyment of the final decree that may be passed.

9. After considering the rival submissions made by the learned counsel Sri. Balakrishna Iyer and also Sri. Parameswara Panicker, learned counsel appearing for the respondents and after considering the records, I am of the view that Article 226 or 227 of the Constitution of India could be invoked by the party for appropriate relief, provided , it is shown that the impugned order will result in miscarriage of justice. It is true that the petitioner has an opportunity to challenge the impugned order in appeal that may eventually be filed if the suit is decided against him. But in a matter where additional evidence sought is to be let in and if it is found to have resulted in denial of an opportunity to put forward the case then it will go to the root of the matter and in case the appellate court agrees with the plaintiff in this regard and remanded the case, that will only delay the final verdict to be given in the matter. True that there is some delay on the part of the petitioner in approaching the court. But that delay cannot be said to be inordinate when we consider the fact that the petitioner had filed a writ petition before this Court challenging the rejection of the application for amendment of the plaint and he had filed the present application within thirty days of the judgment. Further, petitioner herein is the plaintiff

himself and therefore any delay in the final adjudication by examining more witness will only adversely affect his interest because of the delay in case he is ultimately to succeed in the matter. But the real prejudice in this case is that the defendant may have to be recalled for examination in case the plaintiff is allowed to re-open the case. If this prejudice is sufficiently redressed, the court should consider the matter of allowing the application for reopening the evidence.

10. In this connection, learned counsel appearing for the petitioner submitted that his client is prepared to deposit an amount of Rs. 50,000/- (Fifty thousand) before the court below within a time fixed by this court. and the amount could be withdrawn by the defendant in case the defendant has to recall DW1 and re-examine her. This appears to be a very fair suggestion which will safeguard the interest of the defendants in case the application is to be allowed. Though the plaintiff has sought to examine four witnesses, it was also submitted by the learned counsel for the petitioner that he is prepared to give up all the witnesses except Kurian George and at least the request to examine him may be considered in the light of his preparedness to deposit the amount as already offered.

11. Having considered all the aspects of the matter and to prevent miscarriage of justice, the impugned order Ext.P2 to the extent as hereunder

will stand modified.

12. Petitioner will be permitted to examine Sri. Kurian George as additional witnesses in this case on condition that petitioner shall deposit an amount of Rs. 50,000/- within three weeks from today. After examination of Kurian George , if DW1 is to be recalled for further examination, then defendant will be be entitled to withdraw the amount of Rs. 50,000/- (fifty thousand) towards travel expense. This will not form part of the cost. It is further directed that the question as to whether the evidence so adduced by examining the additional witnesses is supported by the pleadings in the case and whether the court could consider such evidence is left open to be decided at the time of final hearing of the case by the court below.

The writ petition is allowed as above.

P.R. RAMAN,
(JUDGE)

knc/-